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**EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW**

Case Law Bulletin
Week of March 20, 2017



IN FOCUS: [Lopez v. Sessions](#)

Second Circuit

[Jian Hang v. Sessions](#), No. 15-3189, 2017 WL 1087860 (2d Cir. Mar. 21, 2017) (unpublished) (ACF; Corroboration)

The Second Circuit denied the PFR, concluding that the IJ and Board did not err in finding petitioner's testimony not credible. The court also agreed with the Board that the petitioner failed to produce reasonably obtainable evidence and compellingly explain the absence of material evidence from the record. *Id.* at *1 (citing *Chuilu Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009) ("[T]he alien bears the ultimate burden of introducing such evidence without prompting from the IJ.")). The Second Circuit granted the PFR in part, remanding for the Board to consider in the first instance whether petitioner remained inadmissible despite the expiration of the 10-year bar pursuant to section 212(a)(9)(B)(i)(II) of the Act.

[Huerta-Morales v. Sessions](#), No. 15-1896-ag, 2017 WL 1086636 (2d Cir. Mar. 21, 2017) (unpublished) (Admissibility-212(a)(9)(B))

Fifth Circuit

[United States v. Perez-Conde](#), No. 15-41375, 2017 WL 1076714 (5th Cir. Mar. 21, 2017) (unpublished) (COV)

The Fifth Circuit affirmed the judgment of the district court, concluding that petitioner's conviction for N.C. Gen. Stat. § 14-32.4 (attempted assault inflicting serious bodily injury) constitutes a crime of violence as defined in 18 U.S.C. § 16(b).

Sixth Circuit

[Lopez v. Sessions](#), No. 16-3083, 2017 WL 1055572 (6th Cir. Mar. 21, 2017) (NACARA)

The Sixth Circuit granted the PFR in part for reconsideration of petitioner's NACARA

application, and specifically for the Board to determine in the first instance whether the petitioner had “not been apprehended at the time of entry.” See 8 C.F.R. § 1240.61(a)(1). The Sixth Circuit concluded that although the Board determined that petitioner was captured one mile from the border and thirty-one minutes after crossing, it did not determine whether petitioner was under surveillance prior to crossing the border. The Sixth Circuit relied on its previous holding in *United States v. Ramos-Godinez*, 273 F.3d 820, 824-25 (9th Cir. 2001), to conclude that the petitioner was free from official restraint and had therefore made an entry, unless the government continued to surveil him from the time he crossed the border until the time of his apprehension.

Seventh Circuit

[Hazma v. Tillerson](#), No. 15-2982, 2017 WL 1046109 (7th Cir. Mar. 20, 2017) (Consular Non-Reviewability)

The Seventh Circuit denied the PFR, finding that the district court did not err in upholding the consular non-reviewability doctrine. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

[United States v. Lynn](#), No. 15-3228, 2017 WL 1101089 (7th Cir. Mar. 24, 2017) (USSG-COV)

The Seventh Circuit affirmed the district court, finding that the Illinois battery statute, 720 ILCS 5/12-3, is divisible because there are multiple ways to commit battery, which are elements rather than means. The court, resorting to the modified categorical approach, found that the defendant’s aggravated battery convictions were crimes of violence under U.S.S.G. § 4B1.2(a)(1), which is similarly worded to 18 U.S.C. § 16(a).

Ninth Circuit

[Ramirez-Ruano v. Sessions](#), No. 13-71765, 2017 WL 1055593 (9th Cir. Mar. 21, 2017) (unpublished) (Asylum-Nexus)

The Ninth Circuit denied the PFR in part, concluding that the record did not compel the conclusion that petitioner was persecuted on account of her proposed social groups, “Guatemalan women,” and “Guatemalan women who are at risk of rape and murder.” However, the court

[De Jesus Flores v. Sessions](#), No. 14-71561, 2017 WL 1067563 (9th Cir. Mar. 20, 2017) (unpublished) (Authentication; Due Process)

[United States v. Gutierrez-Flores](#), No. 15-50407, 2017 WL 1086313 (9th Cir. Mar. 21, 2017) (unpublished) (USSG-Sexual Abuse of a Minor)

[Eleri v. Sessions](#), No. 13-73455, 2017 WL 1101093 (9th Cir. Mar. 24, 2017) (212(h) waiver)

granted the PFR in part, concluding the petitioner may qualify “under the more relaxed nexus standard announced in *Barajas-Romero*.” *Id.* at *1; see *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017).

The Ninth Circuit granted the PFR, concluding that the IJ erroneously admitted documents submitted by DHS from petitioner’s A-file which were not properly authenticated “through some recognized procedure, such as those required by [] regulations or by the Federal Rules of Civil Procedure.” *Id.* at *1 (quoting *Espinoza v. INS*, 45 F.3d 308, 309-10 (9th Cir. 1995)); see also *Iran v. INS*, 656 F.2d 469, 472 (9th Cir. 1981).

The Ninth Circuit affirmed the district court’s enhancement of petitioner’s sentence for conviction under 8 U.S.C. § 1326(a), holding that a violation of section 288(a) of the California Penal Code is a conviction for “sexual abuse of a minor.” *Id.* at *9 (Reinhardt, J., concurring in result) (relying on *United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999), a case concluding that violation of section 288(a) is conviction for an aggravated felony under INA § 101(a)(43)(A) (“sexual abuse of a minor”)); see U.S.S.G. § 2L1.2, cmt. n.1(B) (iii).

The Ninth Circuit dismissed the PFR, concluding that conditional permanent residents are also subject to the aggravated felony bar to the 212(h) waiver of inadmissibility. See INA § 212(h)(2). The Ninth Circuit concluded that the text of 212(h)(2) is unambiguous, that there is no meaningful distinction between LPRs and conditional permanent residents, and even if the text were ambiguous the Court would defer to the Board’s decision in *Matter of Paek*, 26 I&N Dec. 403 (BIA 2014).

Tenth Circuit

[United States v. Titties](#), No. 15-6236, 2017 WL 1102867 (10th Cir. Mar. 24, 2017) (ACCA-COV)

The Tenth Circuit granted the PFR, concluding that Okla. Stat. tit. 21 § 1289.16 (1995), feloniously pointing a firearm, is not divisible and is not categorically a violent felony under 18 U.S.C. § 924(a)(2)(B)(i), which is similarly worded to 18 U.S.C. § 16(a).